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SUPREME COURT, U.S.

No. 81-6773

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

TERESA KAY KIME and DONALD RICHARD BONWELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 700(a), which prohibits the contemptuous burning of the American flag in public, violates the First Amendment's protection of freedom of speech.

2. Whether the district court correctly excluded evidence of petitioners' political purpose in burning the American flag.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 21-22) is not reported. The memorandum opinion of the district court (Pet. App. 23-30) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1982 (Pet. App. 22). A petition for rehearing was denied on March 24, 1982 (Pet. 6). The petition for a writ of certiorari was filed on May 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial before a magistrate in the United States District Court for the Middle District of North Carolina, 1/ petitioners were convicted of knowingly casting contempt upon the United States flag by publicly burning it, in violation of 18 U.S.C. 700. Both were sentenced to terms of eight months' imprisonment. The district court (Pet. App. 28-30) and the court of appeals (id. at 21-22) affirmed both convictions.

1. Prior to trial, petitioners moved to dismiss the indictment, claiming that 18 U.S.C. 700 is "unconstitutional on its face and as applied * * * under the First Amendment to the Constitution of the United States of America" (J.A. 315, 320). The magistrate held an evidentiary hearing and denied both motions (J.A. 351-354).

The evidence at trial showed that on March 27, 1980, petitioner Kime carried an American flag attached upside down on its staff in front of the Federal Building in Greensboro, North Carolina (C.A.App. 89). Petitioner Kime was observed lowering the flag to the ground and petitioner Bonwell was seen bending over it. After a few seconds petitioner Kime raised the flag, which was then burning, and waved it back and forth (id. at 89, 109, 133). When the flag had burned almost completely, she threw the staff and the remains of the flag to the ground, in the direction of the Federal Building (id. at 108-109, 146). Before it was burned, the flag appeared to be new and was not soiled (id. at 137).

During the trial petitioners attempted on several occasions to present evidence regarding the beliefs of the Revolutionary Communist Party, of which both claimed to be members, and

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1/ Petitioners consented to jury trial before the United States Magistrate (C.A. App. 326). "C.A. App." refers to the joint appendix filed with the court of appeals.

regarding the political purpose of the demonstration in which the flag burning occurred. The magistrate excluded the evidence of political purpose and belief on the ground that the evidence was relevant only to whether petitioners' conduct was protected First Amendment activity, which was a question for the court and not the jury (C.A. App. 68-69, 123, 170) 2/

2. The district court affirmed petitioners' convictions. It upheld Section 700's constitutional validity, concluding (Pet. App. 23-24; citations omitted):

> (1) that the statute is narrowly drawn to avoid direct infringement [on First Amendment rights]; and (2) that any incidental burden it imposes is no greater than is essential to further a legitimate governmental interest unrelated to suppression of free expression. Furthermore, the Magistrate meticulously insured that the jury did not convict defendants because of any constitutionally protected expression that may have accompanied their flag burning.

The district court also affirmed the magistrate's decision to exclude petitioners' evidence regarding their political motives on the ground that such evidence was irrelevant and potentially prejudicial (Pet. App. 27).

The court of appeals affirmed "for the reasons stated" by the district court (Pet. App. 22).

ARGUMENT

1. Petitioners contend (Pet. 15-20) that the contumacious burning of the American flag cannot be prohibited consistent with the First Amendment, and that 18 U.S.C. 700 is unconstitutionally overbroad. The decision of the court of appeals rejecting this argument is in accordance with the decisions of all other courts of appeals that have decided the issue and conflicts with no decision of this Court. Accordingly, the decision does not warrant further review.

2/ In this regard, the magistrate specifically instructed the jury that it is not a crime to demonstrate, to deprecate the United States, or to be a communist, and that the jurors should disregard any evidence of such conduct; that petitioners were only charged with knowingly casting contempt upon the flag of the United States by publicly burning it, in violation of 18 U.S.C. 700 (C.A. App. 275-276).

Assuming for the purposes of argument that the burning of an American flag, under the circumstances here presented, is expressive conduct under the First Amendment, 3/ the regulation of such conduct is justified under the reasoning of this Court in United States v. O'Brien, 391 U.S. 367, 377 (1968). There the Court adopted a four prong test for evaluating the constitutional validity of a statute prohibiting the expressive act of burning a draft card. Such a regulatory statute is permissible (ibid.)

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

As the district court correctly concluded (Pet. App. 23), the statute here meets all four parts of the O'Brien test.

First, it cannot be seriously doubted that Congress has Article I power to protect the flag from public acts of contemptuous destruction and desecration. See United States v. Crosson, 462 F.2d 96, 99 (9th Cir.), cert. denied, 409 U.S. 1064 (1972); Joyce v. United States, 454 F.2d 971, 985-986 (D.C. Cir. 1971), cert. denied, 405 U.S. 969 (1972); Hoffman v. United States, 445 F.2d 226, 228 (D.C. Cir. 1971).

Second, the statute here, as found by the courts and Congress, furthers an important governmental interest, viz., preservation of the flag, not as a mere chattel, but as the "visible embodiment of the Nation." Joyce v. United States, supra, 462 F.2d at 101; Hoffman v. United States, supra, 445 F.2d at 228. As Congress found in adopting 18 U.S.C. 700, "[p]ublic burning, destruction, and dishonor of the national emblem

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3/ This Court has cautioned that it "cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376 (1968).

inflicts an injury on the entire Nation." S. Rep. No. 90-1287, 90th Cong., 1st Sess. 3 (1968).

Third, the government's interest is wholly unrelated to the suppression of free speech. The statute was not intended to and "does not prohibit speech, the communication of ideas, or political dissent or protest * * * [nor does it] prescribe orthodox conduct or require affirmative action." 4/ S. Rep. No. 90-1287, supra, at 3. Instead "the legislation was enacted to prohibit the physical act of contemptuously burning a flag, rather than to in any way suppress free speech." United States v. Crosson, supra, 462 F.2d at 102. See also Joyce v. United States, supra, 454 F.2d at 989.

Finally, the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the interest protected by the statute. On the advice of the Attorney General, Section 700 was narrowly drawn to proscribe only those physical acts that Congress concluded demonstrated an unmistakable intention to cast contempt upon the flag. By its clear terms, the statute makes it a crime for anyone to "knowingly cast[ ] contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it * * *." 18 U.S.C. 700. The statute is thus limited to "public acts of physical dishonor or destruction of the flag of the United States * * * intentional, willful, not accidental or inadvertent public physical acts of desecration of the flag. Utterances are not proscribed * * *." S. Rep. No. 90-1287, supra, at 3. See also Smith v. Goguen, 415 U.S. 566, 582 n.30 (1974).

4/ The majority in Street v. New York, 394 U.S. 565, 585, 594 (1969), did not dispute the opinion of the dissenting justices that contemptuous physical destruction of the flag may be prohibited, but declined to address the issue since it concluded that Street might have been convicted on the basis of the words he had spoken rather than the burning of the flag.

Section 700 in no way prevented petitioners from communicating their beliefs. Under the statute, they could, and in fact did, express their views in many ways without the necessity of burning the American flag. Thus, petitioners' claim that the statute is overbroad is incorrect, United States v. Crosson, supra, 462 F.2d at 100-101; Joyce v. United States, supra, 454 F.2d at 984-985; see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., No. 80-1681 (Mar. 3, 1982), slip op. 5-6, and the court of appeals properly upheld the statute as constitutionally permissible on its face and valid as applied to petitioners' conduct. 5/

2. Petitioners next argue (Pet. 10-14) that it was error to exclude the evidence of their political purpose in burning the American flag. This claim is also without merit. The courts below correctly ruled (Pet. App. 27) that the evidence was irrelevant and would only tend to prejudice petitioners and therefore its exclusion was proper. Section 700 is carefully drafted to prohibit only those physical acts performed in circumstances which Congress considered as showing a clear intention to cast contempt upon the Flag. S. Rep. No. 90-1287, supra, at 3.

5/ Contrary to petitioners' assertion (Pet. 16-18), the decision below is not inconsistent with this Court's opinion in Spence v. Washington, 418 U.S. 405 (1974). In Spence, the defendant affixed a removable peace symbol to an American flag, displayed it in his apartment window, and was convicted under a state statute making it a crime to exhibit a flag "to which is attached or superimposed figures, symbols, or other extraneous material." Id. at 405. In holding the state statute unconstitutional as applied, the Court found significant that "[a]ppellant was not charged under the flag desecration statute * * * nor did he permanently disfigure the flag or destroy it. He displayed it as a flag of his country in a way closely analogous to the manner in which flags have always been used to convey ideas." Id. at 415. The Court also noted that the flag was displayed on private property, and that the case could not be "analyzed in terms of reasonable time, place, or manner restraints on access to a public area." Id. at 409. Thus, Spence is clearly distinguishable from the present case, where the flag was contumaciously burned in a public place.

The statute, of course, does not forbid a burning of the flag that is accidental or inadvertent, or when the flag is "in such a condition that it is no longer a fitting emblem for display [and] should be destroyed . . . preferably by burning" (36 U.S.C. 176(k)). See S. Rep. 90-1287, supra, at 3. But any other public burning of the flag is a crime under the statute. Thus, the evidence petitioners proffered regarding their political beliefs and their purpose in burning the flag, was not relevant to any valid defense under the statute. 6/ The district court's evidentiary ruling, as affirmed, does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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6/ As the district court found, the admission of this evidence would have been highly prejudicial since it would have created a risk that the conviction was based on constitutionally-protected expression. Cf. Street v. New York, supra, 394 U.S. at 589. Although petitioners presumably would be estopped to complain about any prejudice caused by the admission of their evidence, the district court certainly was under no obligation to allow the proceedings to be reduced to a debate on political ideas instead of a trial as to petitioners' guilt.

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